tenancy was validly determined by the tenant himself surrendering it back to the landlord then the protection under the Control of Rent Act was no longer there and the appellant thereafter became a trespasser when he was requested to leave the premises. In his grounds of judgment the learned magistrate referred to the case of *United Fire & General Insurance Co. Ltd.* v. *Jaffnese Co-operative Society Ltd.*[1] and acting as he said on that authority he held that the appellant could not claim any protection under the Control of Rent Act because he occupied the ground floor of the premises only by virtue of the subletting by the chief tenant Lau Yai Way whose tenancy had been terminated. He accordingly gave judgment in favour of the respondent and ordered the appellant to deliver vacant possession of the ground floor to the respondent.

With respect, the learned magistrate appears to have misunderstood the case of *United India Fire & General Insurance Co. Ltd.* v. *Jaffnese Co-operative Society Ltd., supra.* In that case the tenants of certain premises sublet a portion of the premises to the appellants after the tenants' own contractual tenancy had been lawfully determined and they were holding over only by virtue of the protection afforded to them under section 16(1) of the Control of Rent Act. The statutory protection afforded to the tenants was personal to them and they were in no position to create any lawful subtenancy in favour of the appellants. Subsequently, the tenants gave up possession of the premises and it was held in effect that the subtenants (the appellants) who remained behind had no right to be there any longer and that they could not claim protection under the Control of Rent Act. "The appellants' case," said Ong C.J. in the Federal Court, "would be unassailable had they been given a subtenancy by a contractual tenant. Such a tenant has a common law right or interest out of which could be carved rights of the same nature."

In the present appeal before me the appellant had obtained his subtenancy from the tenant of the premises when the latter was a contractual tenant of the landlord. The appellant was therefore protected under the Control of Rent Act and could be evicted only in accordance with the provisions of that Act.

In the circumstances I allowed the appeal with costs.

Appeal allowed.

Solicitors: *Goh & Khoo; A. K. J. D'Cruz & Co.*

S.A. ANDAVAN v. SIOW MEOW CHOI

[O.C.J. (Wan Suleiman F.J.) September 10, 1975]
[Seremban — Civil Suit No. 133 of 1967]

Land Law — Charge of land — Insufficient security for debt — Plaintiff lodged caveat — Application for order attaching land of defendant — Application of intervener to set aside Order of Court on grounds of irregularity — National Land Code, ss. 323(1) & 335(1) — R.S.C. 1957, O.43 rr.2(3) & 11(c).

The defendant in this case obtained a loan of the sum of $18,000 from the plaintiff through his attorney and charged his land by way of security in 1966. The plaintiff's attorney discovered subsequently that the land, contrary to what the defendant held it out to be, was insufficient security for the debt. The attorney lodged and registered a private caveat against the land on November 1, 1967, and proceeded to foreclose the charge. On May 14, 1971, when the suit came up for hearing, the defendant was absent without reasonable cause, and judgment was entered for the plaintiff. The plaintiff without applying for a prohibitory order proceeded to attach the land and caused a writ of seizure and sale to be issued and for direction for sale. The intervener applied for an order to set aside the order of court attaching the defendant's interest.

Held: (1) the plaintiff did not come under any of the categories of persons at whose instance a private caveat may be entered under the National Land Code, section 323(1);

(2) the plaintiff failed to register a prohibiting order and this was a material irregularity in the conduct of the sale under Order 43 rule 2(3), the Rules of the Supreme Court;

(3) the intervener's application must be allowed and the order of sale set aside.

Cases referred to:-

(1) *Waimiha Sawmilling Co.* v. *Waione Timber Co.* [1926] A.C. 101.

(2) *Karuppiah Chettiar* v. *Subramaniam* [1971] 2 M.L.J. 116.

CIVIL SUIT.

S. Ponniah for the applicant.

Atma Singh Gill for the plaintiff.

Wan Suleiman F.J.: On or about November 23, 1966 the defendant obtained a loan from the plaintiff through his attorney Subramaniam (affidavit — enclosure 85 in C.S. File) of the sum of $18,000 secured by a Charge on land which the defendant held out was planted with high yielding rubber in area 16a. Or. 20p. in Mukim Ampangan, Seremban District.

In early January 1967 plaintiff's attorney, Subramaniam discovered that the land which had earlier been shown to him and thereafter charged to plaintiff was old rubber and not sufficient security for the loan.

Before proceeding to foreclose the charge, on January 11, 1967 he caused a Private caveat to be registered in the Register of Titles on the land under C.T. No. 14493 Lot No. 1682 in Mukim Pantai, in Seremban District in the event of the foreclosure failing to realise the sum secured. This caveat was registered on the same day *i.e.* January 11, 1967.

Subramaniam then applied for foreclosure of the old rubber land. He recovered the sum of $11,057.55 leaving a balance of $6,942.45 for the recovery of which he filed this suit on August 30, 1967.

On August 2, 1967 the Intervener himself registered a private caveat on C.T. No. 14493 Lot No. 1682 and defendant then gave notice of his intention

to remove plaintiff's caveat. Subramaniam accordingly applied for and obtained an order extending the private caveat until the conclusion of this action, on September 4, 1967.

When the suit came up for hearing on May 14, 1971, the defendant was absent without reasonable cause, and judgment was entered for the plaintiff.

Since he felt that his interest was protected by the private caveat, plaintiff did not apply for a prohibitory order, but applied to attach the land and cause a writ of seizure and sale to be issued and for direction for sale.

In due course, the land was sold by Public Auction for $7,800 to one Liew Hee.

By a Summons in Chambers dated July 12, 1972 the Intervener applied for an order: —

(1) that the Order of Court Attaching the Interest of Judgment Debtor in Immovable Property dated the 22nd day of July, 1971 be set aside, and

(2) that the sale of the land held under Certificate of Title No: 14493, Lot No. 1682, Mukim of Pantai in the Public Auction on the 15th day of June, 1972 in pursuance of the Order of This Honourable Court dated 17th day of April, 1972 be set aside.

It was argued on behalf of the Intervener that the plaintiff does not come under any of the three categories of persons at whose instance a private caveat may be entered under section 323(1) of the National Land Code, *i.e.*

(a) any person or body claiming title to, or any registrable interest in, any alienated land or any right to such title or interest;

(b) any person or body claiming to be beneficially entitled under any trust affecting any such land or interest; and

(c) the guardian or next friend of any minor claiming to be entitled as mentioned in paragraph (b).

I would with respect say that he is correct. The other point he took was that no prohibitory order was registered, even if the private caveat could be called a prohibitory order. The relevant portion of section 335(1) of the National Land Code reads as follows: —

"No prohibitory order shall take effect until it has been entered by the Registrar, in accordance with the provisions of this section, on the register document of title to the land to which, or an interest in which, it relates:"

Accordingly, it was argued, under O.43(2)(3) of the R.S.C. the subsequent sale of the property without seizure was void. O.43(2)(3) reads: —

"No prohibitory order... and no immovable property or registered interest therein shall be deemed to have been seized until such prohibitory order shall have been registered as provided by any written law relating to such land."

Alternatively, I was urged to set aside the order of sale, because of material irregularity in the conduct of the sale, under O.43 r.11(c) which reads:

"Where immovable property... has been sold in execution of a decree,... any person... whose interests are affected by the sale may apply to the court or a judge to set aside the sale on the ground of material irregularity... in publishing or conducting it."

On such grounds of irregularity in the conduct of the sale above, I think the applicant is entitled to have the sale set aside.

There is yet another reason why I would allow the application. In paragraph 25 of the affidavit of plaintiff's attorney (enclosure 85 of the C.S. file), the latter asserted that an examination of the Register by the applicant would show the reason why plaintiff lodged the caveat *i.e.* that plaintiff is a person claiming to be the victim of misrepresentation or to have been defrauded in equity.

However my attention has been drawn to a passage in *Waimiha Sawmilling Co.* v. *Waione Timber Co.*[1] at pages 106/107 which reads:

"If the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent, and so also fraud may be established by a deliberate and dishonest trick causing an interest not to be registered and thus fraudulently keeping the register clear. It is not, however, necessary or wise to give abstract illustrations of what may constitute fraud in hypothetical conditions, for each case must depend upon its own circumstances. The act must be dishonest, and dishonesty must not be assumed solely by reason of knowledge of an unregistered interest."

The principle enunciated in *Karuppiah Chettiar* v. *Subramaniam*[2] will therefore apply, for the plaintiff/respondent in this application can only take whatever interest the debtor/defendant had, and in this case, as in *Karuppiah Chettiar's* case, the debtor had parted with his whole interest in the land.

I would therefore allow this application and set aside the order of court attaching the Interest of the Judgment Debtor of July 22, 1971, and the order of sale of June 15, 1972. Costs to the applicant.

Order accordingly.

Solicitors: *Stanley Ponniah, Ng & Soo; Atma Singh Gill & Gill.*